

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 180 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MOHAN KANAJI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR NITIN M AMIN for Petitioner
MR KC SHAH, APP for Respondent.

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA
Date of decision: 23/02/98

ORAL JUDGEMENT

Appellant-accused (for short original accused No. 1) in Sessions Case No.98 of 1987 has challenged the judgment and order of conviction dated 22nd January, 1991, passed by the learned Additional Sessions Judge, Bhavnagar, holding him guilty under Section 302 of the Indian Penal Code and ordered to suffer rigorous imprisonment for life.

2. Fact which led the prosecution of appellant with

(two others acquitted by the learned Additional Sessions Judge, Bhavnagar) are as under:-

3. Karsen Jadav is the cousin brother of complainant Bhimjibhai Harjibhai Patel. In the morning of 30th June, 1997, deceased Karsan had left on cycle for his field which is towards village Raryana. He left for his field for necessary rope and tiffin for his labourer Nagji. When he reached near Vadi of Daya Arjan Samji Gavaraiya, all the accused came out from that Vadi and assaulted him. Accused No.1 only inflicted blows with (Spade) Kodari which he had. Others two who had with them dhariya and axe, simply stood by accused no.1 and abated him by instigation. However, they have not inflicted any injury on the deceased Karsan. When accused came out of the Vadi of Daya Arjan Samji, Parvatiben Talsibhai (P.W.2) who had come from her house to fetch water from the well of Daya Arjan met or crossed accused who were just coming out of Vadi of Daya Arjan. At that very time, thorn pricked in her leg and she had to wait there. There she heard noise of something like impact by fall of some person and when she saw in that direction, she found accused No.1 giving blows with kodari on the deceased Karsen and accused No.2 and 3 were just standing nearby and instigating accused No.1 saying that kill him, he has killed our father. Deceased Karsan was charged of an offence of murder of the father of accused No.1 and was convicted for the same in the year 1958. He had already undergone life imprisonment. He was released on undergoing life imprisonment somewhere in the year 1973 or about. Since then he was staying in the village carrying out his agricultural activities.

4. Bai Parvati having seen accused No.1 assaulting Karsen left her pots there and went towards her house shouting 'run Karsan is being killed'. On the way she met Laxman and then Visabhai and then she went to the house of Bhimjibhai whom she told about the incident. Bhimjibhai (P.W.1) came to the scene of offence where Laxman (P.W.5) and Viha Sata were present. He then went to Gadhada Police Station where offence was registered. Investigation was carried out. Accused were chargesheeted in the court of Judicial Magistrate First Class, Gadhada. The learned J.M.F.C., Gadhada, in his turn committed the accused to the court of Sessions at Bhavnagar to stand their trial.

5. Learned Additional Sessions Judge, Bhavnagar, framed charge against the accused who pleaded not guilty claimed to be tried. Prosecution led necessary evidence to prove charge levelled against the accused. On

completion of the prosecution evidence, further statements of the accused were recorded under Section 313 of Code of Criminal Procedure. From the said statement the defence of the accused is of total denial and wrong implication because of the previous incident. Accused have not led any evidence in defence. Learned Additional Sessions Judge after hearing the learned advocates for the prosecution and defence, acquitted accused No.2 & 3, however, convicted accused No.1 of an offence punishable under Section 302 of the I.P.C. Said judgment and order is assailed in this appeal.

6. Mr. Amin has challenged this order of conviction and has assailed the judgment of the learned Judge on the grounds that the learned Judge has erred in accepting the evidence which suffers inherent improbabilities. All the prosecution witnesses are related to the deceased one way or the other and have enmity with the accused in view of the past incident. Incident has taken where independent witnesses would be available yet not a single independent witness is examined. Mr. Amin contended that looking to the medical evidence, time of incident as said by the witnesses is either got up or a concocted one. In view of the evidence of the doctor rigor mortis having set suggest that death must have taken place some 2 to 3 hours before the commencement of the post-mortem examination which is 11.00 Clock in the instant case. In view of this time if death may come to around 9.00 a.m. Mr. Amin contended that the prosecution witnesses are suppressing the real time of incident and are preponing back the time of incident, only with a view to explain away absence of independent witnesses. This conduct of the witnesses itself makes their evidence untrustworthy suspicious and a doubtful one. Mr. Amin further contended that in the circumstances of the case, appellant-accused should be given benefit of doubt. Mr. Amin therefore contended that the prosecution witnesses are also suppressing the real place of incident in as much as certain articles alleged to be with the deceased, are not found from the scene of the offence. However, there is improvement in the real evidence of witness. Mr. Amin, therefore, contended that accused should be given benefit of doubt as prosecution has failed to prove beyond reasonable doubt the guilt of the accused.

7. Learned APP Mr. Shah supports the judgment of the learned Additional Sessions Judge. Mr. Shah contended that explanation of the prosecution for absence of rigor mortis, has been rightly accepted by the learned Additional Sessions Judge. According to Mr. Shah, as the Jaw of the deceased was cut out by the blows given by

the accused, rigor mortis which normally or usually first sets in the jaw could not be noticed by the doctor as jaw was not there. The rigor mortis sets in other parts of body at a subsequent time and before it can set in there the dead body was examined by the doctor. Mr. Shah therefore contended that absence of rigor mortis does not suggest that time suggested by the witnesses as to incident is not correct. Mr. Shah further contended that the incident took place at a time when the villagers may not have wake up and therefore there may be independent evidence. Because independent witnesses are not available it does not make the evidence of the prosecution witness uncreditworthy. Under the circumstances, the appeal should be dismissed.

8. In the instant case, the prosecution has relied on two witnesses to the incident. P.W.2 Bai Parvati has deposed that on the day of incident, she had gone to fetch water from the bore-well of Daya Arjan which is about 6 to 7 houses away from her house. When she reached and entered the gate of the Vadi of said Daya Arjan, three accused rushed out of that Vadi. She just gave them way and a thorn pricked her leg, she was just removing the thorn when she heard some impact. According to her, she saw Karsan Jadav (now deceased) going with tiffin. He was going towards West and she heard impact. When she saw in the direction of impact, she saw Mohan Kanji (accused No.1) inflicting blows on Karsan. He was inflicting blows immediately on going outside the gate. She left her on road water pots and ran towards the village. Mohan Kanji was inflicting blows while Kalu, Kanji and Dhanji were standing and instigating to kill as he had killed our father. While she was running away, Laxman P.W.5 met her. She told him to run for help as Karsan is assaulted. She then met Viha Sata Bharwad (P.W.3). She then came home and found that her husband was not in the house and had gone to Vadi. She therefore went running to the house of Bhimji and informed him about the incident. If we looked at the Map Exh.18, the scene of offence is at a distance of 66 feet away from the gate of Arjan Samji Gavaria where thorn pricked her leg. Her house is about 6 houses away to the East from the scene of offence. House of Bhimji is 4 houses away towards the East and from that point about 4 houses away towards the North. She has not gone to the house of the deceased which is 4 houses away from her house towards the East. According to her, she was at the scene of offence because she had gone there to fetch water as in other bore wells was not available. In the cross-examination, she states that she did not remember however through the evidence of P.I., it is proved that

she has not stated that there was drought in that year and there was no water in borewell and she used to go to fetch water at the Vadi of Daya Arjan. In the cross-examination, she has referred to borewells however she has stated that there was no water available from those borewells. Mr. Amin therefore contended that if this be state of affairs about the water in village then almost all the women of the village must be going to fetch water from the well of Daya Arjan. P.W. 2 Parvatiben Talsibhai has admitted that there was neither a woman to fetch water nor any followed her to fetch water from the well of Daya Arjan. Thus, she was the only woman who had gone to fetch water from the well. Mr. Amin contended that when there was no water available in the borewell of any other in the village and when the water was available only in the borewell of Daya Arjan, and she was the only woman to have gone to fetch water, makes her say suspicious or doubtful one. There is bound to be some woman to fetch water from the well. It may be that there may be no rush but total absence either at the well or on the way is not believable. Thus, say of P.W.2 that she saw incident and she was all alone at the time of incident, makes her say doubtful and suspicious one. If her evidence is read closely then what is stated is that when she heard the impact she was about 40 feet away from the well. Map Exh.18 shows that the well is at the distance of 300 feet towards the South from the gate of the Vadi of Daya Arjan Samji. If she was 40 feet way from the well then she cannot see 260 feet away from the gate towards the South. In no case, she could have seen the incident at the spot shown in the Map. In the oral evidence, she has stated that incident took place near the gate. However in the Map, place of incident is shown in a north east direction at a distance of 66 feet, where dead body was found. It is not the case of the P.W.2 Parvatiben that when Karsan saw these three accused, he did not try to run away in any direction. Karsan was going in the west to his Vadi. Place of incident does not come on his way to Vadi if we see in Map Exh.18. Mr. Amin therefore contended that P.W.2 was the only woman who had gone to draw water and she was away from the well at a distance of 40 feet, when she heard sound of impact. According to her, incident took place near the gate of Daya Arjan Vadi and she left there her water pots and ran. This shows that she may not have seen the incident. P.W.2 Parvatiben is the wife of the first cousin of the deceased. She is also a tenant in the house of the deceased. The motive as alleged is the murder of father of accused No.1 and 2. It is in evidence that the said murder was caused because of some dispute of land, Husband of this woman must also

be concerned with said dispute of land. In view of this fact, this P.W.2 Parvatiben is an interested as well as partisan witness, interested in success of the prosecution. In the circumstances, it will be necessary to have some independent corroboration before her evidence can be accepted. In our opinion, there is no independent corroboration to her evidence. Medical evidence even do not corroborate her say. Bhimji Harji P.W. 1 has lodged complaint on information received from P.W.2. Parvatiben. Therefore, unless the evidence of Parvatiben P.W.2 is acceptable, question of acceptance of evidence of P.W.1 Bhimjibhai Harji does not arise.

9. P.W.2 Parvatiben on seeing the incident ran towards the house shouting to run as Karsan is assaulted. She met with Laxman P.W.5, first on the way and Laxman P.W.5 went in the direction of place of incidence. Laxman P.W.5 has said that he had left his house at about 6.00 clock in morning on that day to go to his Vadi. His Vadi is on the western side of his house. His house is situated near the chowk in the village. Parvatiben is his brother's wife. Parvatiben met him on the road and told him that Mohan, Kalu and Dhanji are beating Karsan. He therefore ran towards western outskirts. He saw accused beating from a distance and shouted. Accused No.2 and 3 ran away with their weapons. While going away they spoke that see that he may not go live. Mohan had given two blows of spade. However he had not seen where the blows fell as he was away. When he reached near Karsan, he was injured on the head and neck. Two to three wounds were caused earlier. Before he reached the scene of offence, Viha Sata had shouted from behind and Mohan Kanji had run away after inflicting one blow on Karsan Jadav. He has also said that there was a rope ('rash') and a jar without bread on the cycle. According to him, at the scene of offence, he and Viha Sata were alone and Bhimji P.W.1 had come and then went to file a complaint. There was a pool of blood and therefore bleeding was there from the injuries of Karsan. From the cross-examination, it is proved that say that he was told by Parvatiben that Mohan, Kalu and Dhanji are beating Karsan is an improvement. Parvatiben had not given the name of the assailants. Find of rope is also an improvement as the same has not been found and referred to in the Panchnama of the scene of offence. In the cross-examination, he has admitted that when he saw the scene of offence, he had not noticed whether there was a rope on the cycle or not. Though he has not seen rope at the scene of offence, in the cross-examination he states that he has seen rope at the scene of offence. He has improved by saying that he had seen bread at the scene of

offence. However, he has not seen water pots at the scene of offence. Fact remains that he reached the scene of offence, rushing on hearing from Parvatiben. As can be seen from the medical evidence that rigor mortis was absent, the time of incident as alleged by the witness appears to be a doubtful one. The witness has not stated as to why he was required to go in the early morning at 6.00 clock. Thus, the evidence of this witness, in our opinion, in absence of any independent corroboration is not creditworthy. We will refer to the evidence of this witness also at the time when evidence of Naga Vama P.W.4 is discussed.

10. Prosecution has also relied on the evidence of P.W.3 Viha Sata. According to the prosecution, Viha Satha is also an eye-witness. However, in our opinion, he is not an independent of Parvatiben. According to Viha Satha (P.W.3) in the morning of the day of incident, he was tethering cattle. Parvatiben was going running and shouting from western side. She was shouting that run Karsan is killed. He, therefore, ran in the direction from where Parvatiben was coming. Laxman was running ahead of him in the western direction. When he was at a distance of 40 feet away, accused had run away after giving spade blow. Only accused No.1 was present there. He was beating Karsan. He shouted to leave him so that he may be saved. There was a rope to tie Ox with the cycle. In the cross-examination, he has stated that he was waiting after tieing his Ox and heard shout of Parvatiben from a distance of 10 to 12 feet. If we referred to Map Exh. 18, his house is one house away from the scene of offence which is 101 feet away as per the distance shown in the Map. According to him, he heard the shout of Parvatiben from a distance of 12 feet. He then ran in the western direction where he saw Laxman P.W.5 going ahead. He also saw accused No.1 giving one blow on the deceased. From the evidence of Viha Sata (P.W.3) and Laxman Vasaram (P.W.5), it appears that accused were waiting for someone to see their performance of assault. When a person commits an act which is contrary to law, they will be vigilant to see that their act is not seen by anyone. Many time incidents take place in a spur of moment or are preceded by some scuffle or some exchange. In such state persons may have gathered, however the culprits do take care to screen them. In the instance case, the incident took place in the early morning as per prosecution story. It is surprising that accused gathered in the Vadi of Day a Arjan Samji Gaveria before 6.00 clock in the morning, as if they were knowing that deceased Karsan was to pass near the gate of this Vadi to go to his field in the

early morning at about 6.00 clock and have planned to assaulted him to take revenge of an incident of in the year 1958 and for which the deceased had already undergone life imprisonment. It is surprising how the accused came to know that deceased was to pass from near that place at that time which is not his routing time. This makes the case of the prosecution a doubtful one.

11. Mr. Amin contended that the field of deceased and the accused are adjoining to each other. Accused did not take revenge for the murder of his father for a pretty long period of about fifteen years. What it happened that all of a sudden they had an idea to take revenge. No facts suggestive of such idea is on record. This very fact, in our opinion, suggest that the prosecution is suppressing the genesis of the case.

12. There is also an evidence of Naga Vama P.W.4. Naga Vama is a labourer of deceased. According to him, Karsan used to come at Vadi in the morning at about 6.00 clock. On the previous day, Karsan had taken rope to tie grass on the bicycle. He had told him not to take away rope as the same may be required in the morning. Karsan had told that he will bring it on next morning. As Karsan did not come in time to Vadi, he started to go to his house to take rope. On the way when he reached near the outskirts, he saw Karsan coming on a bicycle from the Eastern side. He saw Mohan Kanaji at that time coming out of the gate of Daya Arjan Samji, followed by Kalubhai and Dhani. They had weapons in their hands. They were going in the direction from where Karsan was coming. Then he saw Mohan inflicting blow on Karsan and heard Kalu and Dhani saying that beat him so that he may not remain alive, he has killed our father. He also saw Parvatiben, who had come to fetch water, shouting. We will refer to the cross-examination at a latter. If we read Exh.18 Map, deceased was coming from eastern side going towards western side. Accused come out of the Vadi on that East West road. P.W. 4 saw this from the western end of the road. If we have to accept the say of Naga, question incident must have taken place near that Vadi then how the place of incident is away from the road on the northern side of that road. It is not the case of any witness that on seeing accused or accused trying to assault, Karsan ran in any direction. This witness has also seen Parvatiben shouting and running in the western direction. We are not able to reconcile the say of this witness that he saw Parvatiben running away shouting, and the say of Parvatiben that she heard impact when she was 40 ft. away from well, i.e. 260 ft. away on the south towards well from the gate and the place of offence is in

the north 66 ft. away from the gate as alleged by the prosecution. According to Naga Vama, he came near the scene of offence on his way to the house of Karsan who had not reached Vadi as said by him, on the previous day. He was going to the house of Karsan to take rope to tie Ox. Fact whether rope is found from the scene of offence or not is a doubtful fact. None of the witnesses P.W.2,4 and 5 have referred in the police statements, presence of rope on the bicycle or at scene of offence. It is not mentioned in Panchnama of scene of offence. According to this witness, deceased was to come with tiffin. The tiffin is also not found from the scene of offence. Surprisingly, witness Laxman Vasaram (P.W.5) has improved his case as to presence of tiffin and rope. This improvement is with a view to support and establish presence of Naga Vama (P.W.4). Apart from this, if we now consider the evidence of Naga in his cross-examination, it still makes worse the prosecution case. According to him, this was for the first time that the deceased had taken away rope. Deceased had in past never taken the rope. Deceased had never used rope to tie grass. P.W. 2 heard the impact and saw the scene of offence, while this witness P.W. 4 has not heard the impact. He has however reached the scene of offence and had told the same to one Kalubhai, about the incident. However, it does not transpire from the evidence of other witnesses that he had talked them about the incident. In our opinion, therefore, evidence of this witness is also not a acceptable one in absence of any other independent corroboration.

13. P.W.1 Bhimaji Harji immediately on visiting the scene of offence had gone to the police station lodge the complaint. However, he admits that he did not signed the complaint at that vary time. He however signed the same after the police officer visited the site drew the panchnama of scene of offence and inquest report, took away corpse for post-mortem examination and when came back. Police Officer P.W.8 has deposed that he recorded the complaint at about 8.30 and took the signature of the complainant Bhimaji (P.W.1). He then went to the scene of offence however, the statements of the witnesses were recorded in the afternoon after 4.00 p.m. According to the witnesses, P.W.2, P.W.3 and P.W.4, they were called by the I.O. Question is how name of P.W.4 came to be disclosed before I.O. It will be pertinent to note that of the panchas, particularly of inquest report, panchnama of the scene of offence; panchnama for arrest of the accused; one panch Gumansingh Jethuba is a common panch. Said Gumansingh was a co-accused in a case of murder of the father of accused No.2 and 3 in 1958. By the

evidence of that Gumansingh, panchnamas are proved. Unfortunately said panch cannot be said to be an independent witness qua accused persons.

14. It is surprising to note that though accused No.2 and 3 had weapons namely dharia and axe and though accused No.2 and 3 had the same vengeance against Karsan, they have only stood by holding their patience and anger in control without inflicting any blow on the deceased. Thus, when these alleged eye-witness are interested and partisan one, and their evidence is suspicious and doubtful, it will be hazardous to accept the same in absence of an independent corroboration. Prosecution evidence creates doubt by absence of rigor mortis which may suggest time of commission of offence. It will be hazardous to rely on such evidence and accept the same. It is surprising that though incident took place in the early morning at about 6.00 clock at the outskirts surrounded by residential locality no resident of that locality heard the shouts of Parvatiben. From the Map, it appears that on the east of the incidence at a distance of 40 feet, there is a house of Suthar Naran Lalji; at a distance of 60 feet there is a house of Gaberam Bharwad and his brothers; at a distance of about 84 feet on the western side there is a house of Kalyan Samji. All witnesses examined are the member of the family of deceased and are also related to each other as cousins of the first or second degree. It appears that in absence of any independent corroboration, even of medical evidence, it will be hazardous to rely upon this witnesses. In view of the above discussion, the appellant-accused is entitled to benefit of doubt. The learned Additional Sessions Judge, has thus erred in accepting such evidence.

15. In the result, the appeal is allowed. The judgment and order of the learned Additional Sessions Judge, Bhavnagar, is set aside. Appellant-accused is acquitted of the charge levelled against him and he be set at liberty forthwith if not required in any other case.

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